

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2119

To be argued by
BARBARA S. JONES

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2119

JAMES HEIMERLE,
Petitioner-Appellee,

—v.—

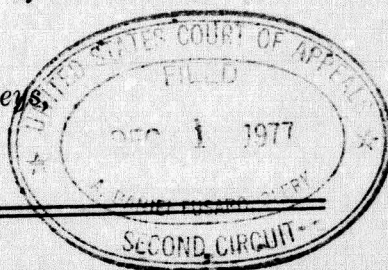
UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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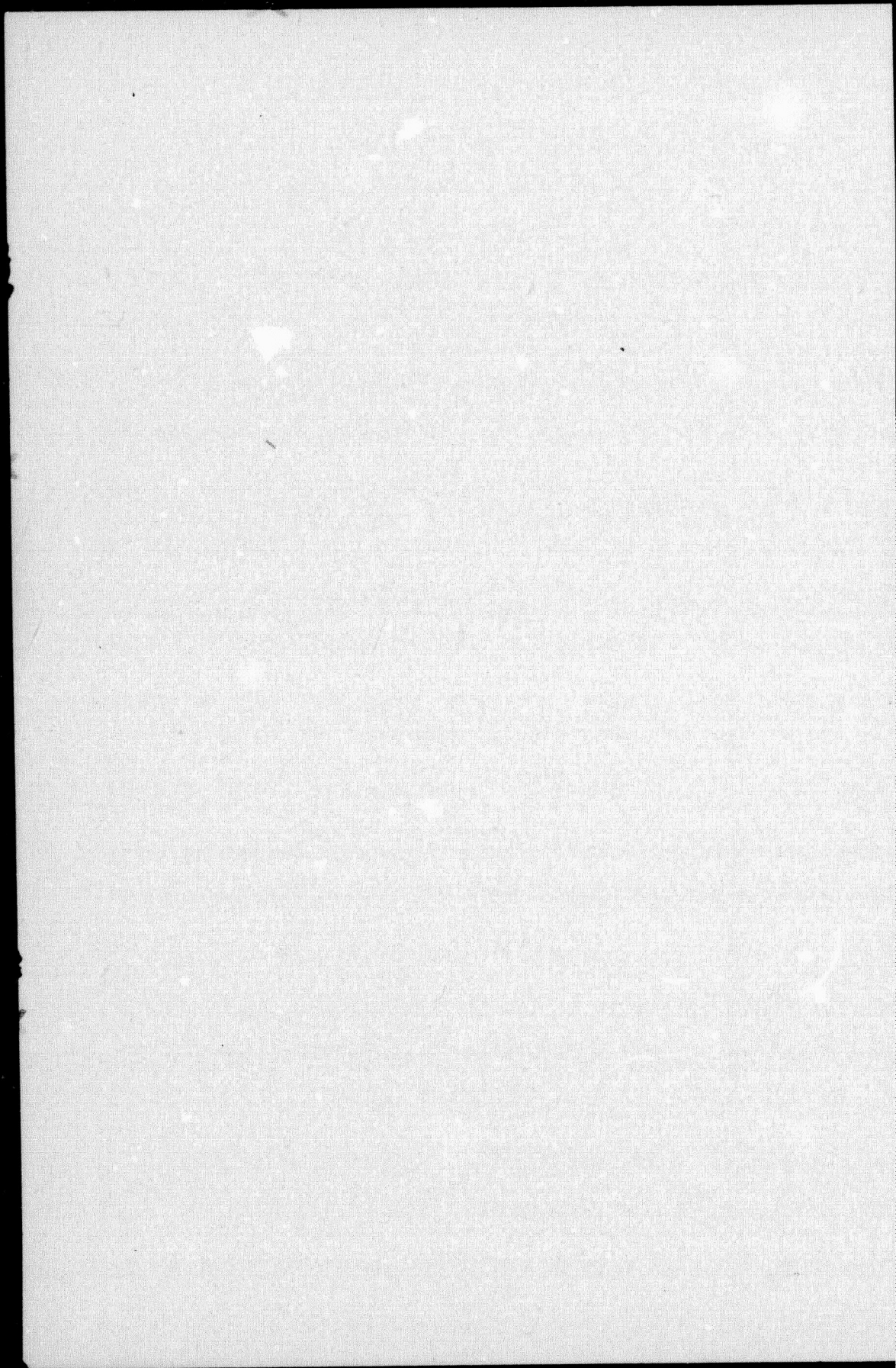


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28 U.S.C. § 2255	1 and <i>passim</i>

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2119

JAMES HEIMERLE,
Petitioner-Appellee,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America appeals pursuant to Title 18, United States Code, Section 3731, from an order of the Honorable Robert L. Carter, United States District Judge, entered in the United States District Court for the Southern District of New York on June 22, 1977, granting a motion made by James Heimerle pursuant to Title 28, United States Code, Section 2255, to dismiss Indictment 72 Cr. 1330 and to vacate his conviction thereon.

Indictment 72 Cr. 1330, filed in three counts on December 6, 1972, charged James Heimerle and co-defendants Vincent Rizzo, Matteo DiLorenzo, Sam Salli, William Mizono, and Joseph Calise with conspiracy to possess and distribute counterfeit fifty and one hundred dollar bills (Count One) and with knowingly possessing and trans-

ferring such bills (Count Two and Three, respectively), in violation of Title 18, United States Code, Sections 371, 472, 473 and 2.

On May 11, 1973, after a jury trial, James Heimerle was found guilty of Counts One and Two of the indictment; on June 18, 1973, he was sentenced to concurrent one-year terms of imprisonment and fined \$1500.00. Heimerle's conviction was affirmed on appeal. *United States v. Rizzo*, 492 F.2d 443 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974).

On December 17, 1976, James Heimerle filed a motion pursuant to Title 28, United States Code, Section 2255, making for the first time a claim under the Interstate Agreement on Detainers (hereinafter "the Agreement"), 18 U.S.C. App. (App. 11-14).^{*} On March 2, 1977, Judge Carter denied Heimerle's motion in all respects. (App. 49-55). However, on June 22, 1977, Judge Carter granted Heimerle's motion to reconsider and, on reconsideration, vacated Heimerle's 1973 conviction and dismissed the indictment. *Heimerle v. United States*, 76 Civ. 4277, 76 Civ. 5669 (S.D.N.Y., June 21, 1977). (App. 57-59). The United States then moved for reconsideration of that order. This motion was denied on July 28, 1977. (App. 90).

Statement of Facts

James Heimerle was indicted on December 6, 1972, for the above-named violations of federal law. At the time of this indictment, Heimerle was a prisoner in New York State custody awaiting sentence on an unrelated case. On December 13, 1972, he was sentenced in the state matter to a term of four years imprisonment. He com-

^{*} "App." refers to the Government's appendix in this appeal.

menced the service of this sentence on December 21, 1972, at Ossining Correctional Facility. (App. 13).

On January 5, 1973, a *writ of habeas corpus ad prosequendum* was filed in the District Court to produce Heimerle in the Southern District of New York for arraignment on Indictment 72 Cr. 1330. On January 18, 1973, he was produced, pursuant to this writ, before the Honorable Robert L. Carter and he pleaded not guilty to the indictment. After arraignment, Heimerle was returned to state custody. On May 3, 1973, a second *writ of habeas corpus ad prosequendum* was issued in connection with this indictment. Heimerle was transported by the United States Marshal pursuant to this writ from Greenhaven County Jail in Stormville, New York, back to the United States Courthouse, Foley Square, for trial on the indictment. On May 11, 1973 Heimerle was convicted of possession and conspiracy to possess and distribute counterfeit \$50 and \$100 bills, after a jury trial. On June 18, 1973, Judge Carter sentenced him to two concurrent one-year terms of imprisonment to commence upon the completion of his four year state prison sentence, and a \$1500 fine. Heimerle remained in federal custody continuously from May 3, 1973 to July 6, 1973, on which date he was delivered back into state custody at the Greenhaven County Jail. Heimerle subsequently appealed his conviction, which was affirmed by this Court. At no point either during trial or on appeal did he raise any claim under the Agreement.

On December 17, 1976, Heimerle filed the present motion pursuant to Title 28, United States Code, Section 2255, raising for the first time his claim that the facts recited above constituted a violation of the Agreement, and that his conviction should be overturned on this ground. After receiving opposing papers from the Government, in which, *inter alia*, the Government contended

that relief pursuant to Section 2255 was unavailable, Judge Carter denied Heimerle's motion in a memorandum opinion dated March 2, 1977. In brief, he stated that since trial had commenced within the 120 days of the initial transfer required by Art. IV(c), the Agreement had not been violated (App. 53). Heimerle then sought reconsideration of the decision (App. 54-56), and on June 22, 1977 Judge Carter issued a second memorandum opinion granting Heimerle's motion on the ground that the underlying facts amounted to a violation of Art. IV(e) of the Agreement, and that Heimerle had not waived his rights thereunder. (App. 58-59). The Government then sought reconsideration of the decision, urging, *inter alia*, that Heimerle stated no claim cognizable under Section 2255, and that *Mauro* should not be applied retroactively to transfers that antedated the decision. (App. 65-70; 76-80). This motion was denied by Judge Carter on July 28, 1977, with the endorsement "The motion is denied. For policy reasons, the issues raised by this motion can best be disposed of by the Court of Appeals" (App. 90).

ARGUMENT

A Claimed Violation of the Interstate Agreement on Detainers May Not be Raised by a Motion Under Title 28, United States Code, Section 2255.

In the District Court, the Government contended that a claimed violation of the Interstate Agreement on Detainers may not be raised for the first time on collateral attack by means of a motion pursuant to Title 28, United States Code, Section 2255. (App. 36-43; 65-70). In none of his opinions on the matter did Judge Carter address the issue, but rather appeared to resolve it *sub silentio* against the Government. At the time of his ruling, this Court had not addressed the issue; indeed, in the only

decision involving the invocation of the Agreement on collateral attack, the Court had expressly reserved the question, and decided the case on other grounds. *United States v. Chico*, 558 F.2d 1047, 1049, n.6 (2d Cir. 1977).

Since Judge Carter's decision, however, this Court has expressly ruled that a claim under the Agreement cannot be raised for the first time on collateral attack. *Edwards v. United States*, Dkt. No. 77-2048, slip op. 123 (2d Cir., October 25, 1977). The *Edwards* decision is absolutely dispositive of this appeal, and we rely primarily upon it.

The facts in *Edwards* differ in only one significant respect from the facts here. *Edwards*, like *Heimerle*, was indicted for violations of federal crimes at a time when he was already in the custody of New York State on state charges. Prior to trial on the federal charges, he was brought on at least one occasion to the United States Courthouse in Foley Square and returned to state custody, in conceded violation of Art. IV(e) of the Agreement, as interpreted by this Court in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183 (Oct. 4, 1977) and *United States v. Ford*, 550 F.2d 732 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183 (Oct. 4, 1977).*

Unlike *Heimerle*, however, *Edwards* subsequently pleaded guilty to the federal charges against him, and was sentenced to a prison term on that plea. More than

* The Government continues to believe that both *Mauro* and *Ford* were wrongly decided. However, since the Supreme Court has indicated that it will resolve the question of whether and the extent to which the Agreement governs the federal government's use of a writ of *habeas corpus ad prosequendum*, we are not at this time asking this Court to reconsider its previous decisions. See *United States v. Edwards*, *supra*, slip op. at 125, n.1.

a year after his conviction, he claimed for the first time that the violation of Art. IV(e) of the Agreement required the dismissal of the indictment and the vacation of his conviction. Judge Metzner, who had presided at Edwards' guilty plea and who entertained the Section 2255 motion, denied the motion. He ruled that while a claim under the Agreement might be raised on collateral attack, Edwards had waived his claim by pleading guilty.* On appeal, this Court expressly declined to adopt the reasoning of Judge Metzner; rather, it is stated "[w]hile we have no quarrel with the ground on which Judge Metzner placed his decision, we think it preferable to affirm on the broader basis that a claim based on a violation of the IAD is not within 28 U.S.C. § 2255." Slip op. at 125. After reviewing the requirements for Section 2255 relief framed by the Supreme Court in *Hill v. United States*, 368 U.S. 424, 428 (1962) and *Davis v. United States*, 417 U.S. 333, 346 (1974), and considering recent decisions of this Court finding relief pursuant to Section 2255 inappropriate under facts more "appealing" than those presented by Edwards, see *Alfano v. United States*, 555 F.2d 1128 (2d Cir. 1977); *Del Vecchio v. United States*, 556 F.2d 106 (2d Cir. 1977), the Court concluded that a claimed violation of the Agreement did not constitute a "complete miscarriage of justice" or an "exceptional circumstance." Slip op. 127. Thus, it affirmed the denial of Edwards' motion.

* Judge Metzner clearly considered the difference between a guilty plea and a conviction after trial to be of considerable significance in determining the availability of subsequent relief under Section 2255. In a separate case, he has vacated a conviction after trial because of a violation of the Agreement, even though the defendant never raised the Agreement claim at trial, on appeal, or any time prior to filing a motion pursuant to Section 2255. *United States v. Enright*, 77 Civ. 449 (S.D.N.Y., Sept. 14, 1977). The Government is appealing the *Enright* decision, Dkt. No. 77-2133, since the subsequent *Edwards* decision is inconsistent with and dispositive of it as well.

The only significant difference between the *Edwards* case and this one is that although neither Edwards nor Heimerle raised the issue prior to conviction, Edwards pleaded guilty, while Heimerle proceeded to trial. Since the *Edwards* Court expressly noted that the fact of Edwards' guilty plea was *not* the basis of its decision, and that it affirmed on the "broader basis" of unavailability of relief pursuant to Section 2255, this case is clearly governed by *Edwards*. It follows for this reason alone that Heimerle was not entitled to the relief Judge Carter granted him, and the order of the District Court should be reversed.*

* Since the concise *Edwards* opinion is dispositive, we will not burden the Court with either an extended argument concerning the non-availability of Section 2255 relief in these circumstances, or with alternative arguments why Judge Carter's order should be reversed. For the interest and aid of the Court, however, we are reproducing in our Appendix our brief in the *Edwards* case. Point III of that brief, at pp. 13-19, contains a more extensive—although, in this case, unnecessary—discussion of the requirements of Section 2255 relief. In addition, Points II and V(A) of the *Edwards* brief contain separate arguments that also apply to this case. In short, for the reasons stated in those portions of the brief, we believe that even if Heimerle were permitted to invoke the *Mauro* decision on collateral attack, *Mauro* should not be applied retroactively to interjurisdictional transfers that antedated it.

Since in *Edwards* the Court indicated that the unavailability of relief pursuant to Section 2255 was the preferable manner of disposing of this particular congeries of issues, we ask the Court to reverse on that ground. In the event that the Court disagrees with our analysis of the *Edwards* decision, we respectfully refer the Court to the alternative grounds for reversal contained in Points III and V(A) of the *Edwards* brief.

CONCLUSION

**The order of the District Court should be reversed,
and Heimerle's motion pursuant to Title 28, United
States Code, Section 2255 should be denied.**

Respectfully submitted,

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COUNTY OF NEW YORK) ss.:

Barbara S. Jones, being duly sworn,
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the United States Attorney for the Southern District
of New York.

That on the 1st day of December, 1977,
she served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

placing two copies of the brief and appendix in an envelope
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Edward M. Chikofsky, Esq.
3 West 57th Street
New York City, New York 10019

which envelope Mr. Chikofsky picked up at the office of the
United States Attorney for the Southern District of New York.

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Barbara S. Jones
Asst. U.S. Attorney

Sworn to before me this

1st day of December 1977

MAUREEN EGAN
Notary Public State of New York
No. 43-4654262
Qualified in Richmond County
Commission Expires March 30, 1979

Maureen Egan

